IN THE COURT OF COMMON PLEAS IN AND FOR NEW CASTLE COUNTY

FOR THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
TERRI MAURER-CARTER,	)	**Case Nos: 0412009852 (T. Maurer-Carter)**
ANNA L. WHITE,	)	**0412009994 (A. White)**
LAURA F. WHITE and	)	**0412009853 (L. White)**
RACHEL E. WHITE,	)	**0412009995 (R. White)**
	)	
Defendants.	)	

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FINAL ORDER ON REARGUMENT

The Attorney General has filed a Motion to Reargue Dismissal (the "Motion") of the above-captioned criminal matters heard before the Court on the Non-Jury Trial calendar April 4, 2005. Mr. Balick, on behalf of all Defendants, has filed an Answer and the Court has reviewed the pleadings and record. This is the Court's Final Decision on Reargument. The Motion, on its face does not seek to re-open the Rule 48(b) Orders for all defendants issued on April 4, 2005. Nor does the Motion seek to supplement the April 4, 2005 Court record with affidavits. As such, in deciding the Motion, the Court is limited to the Court transcript and official records in the Criminal Clerk's file, including notices and/or summonses.[1]

[1] As with a C.C.P. Civ. R. 59(e) Reargument, oral argument is at the discretion of the Court.

The Court notes that while the Attorney General has not offered a Court of Common Pleas Criminal Rule, a State statute, or state case law that grants authority to this statutory court to Reargue a Rule 48(b) Dismissal Order. However, the Court in the interest of justice shall reserve jurisdiction and decide the Motion.

THE ATTORNEY GENERAL'S MOTION

The Attorney General seeks to reargue all 48(b) Orders in the cases listed above. In part, the State argues facts which appear outside the record and the certified transcript of the proceedings that appears in the Criminal Clerk's file. The State asserts in Paragraph 3 of the State's Motion to Reargue provides that Frank Kaleta, Director of Public Safety at the Christiana Mall "had received multiple dates for trial in this case and those are the three co-defendants" and subsequently contacted the Attorney General's Office. Outside the record, the Attorney General argues Mr. Kaleta was "quite confused" by multiple notices and contacted the Court of Common Pleas Attorney General's Office on April 1, 2005. An unidentified Court of Common Pleas employee allegedly consulted the JIC system to verify the correct date as April 6, 2005. Since the Attorney General's Motion is to Reargue, not Re-Open, these extrinsic assertions by the State set forth in its Motion may not be considered by the Court as outside the record.

The Attorney General also alleges in its Motion that the Court of Common Pleas files indicate that a notation on Sidney Balick's continuance request March 3, 2005 was incorrect that provided "there was no objection by the State per contact with Latasha Brown". No affidavits were submitted to contradict what appears on the Court's records wherein the State alleges the continuance granted by Judge William C. Bradley was *ex-parte* and without the State's permission.

Finally, in paragraph 8 the Attorney General argues in its Motion that a "[c]urrent review of the JIC system lists no trial date for co-defendants Anna White, Laura White and Rachel White, and a trial date for co-defendant Terri Maurer-Carter of April 6, 2005." [2]

Mr. Balick's answer (the "Answer to the Motion") in paragraph 2 provides, in relevant part, that the "State acknowledged the trial was scheduled for April 4, 2004, and that the case was dismissed when the State's witnesses did not appear for trial." All co-defendants, through counsel, also note that the Court checked with the Court Clerk on the record and was advised by the Criminal Clerk that the State witness and all the defendants were notified in advance that the trial was scheduled April 4, 2005 at 1:30 p.m.[3] Co-defendants assert in their Answer that Defendants' counsel did contact the State to inquire about the State's position to reschedule the matter but did not receive a response at the time of filing the letter to the Honorable Alex J. Smalls which Judge William C. Bradley signed as Office Judge. Co-defendants assert that "it is clearly noted on the attached copy of the letter to Judge Smalls dated March 3, 2005 the Court was aware that there "was no objection by the State per Latasha Brown." Co-defendants therefore argue the continuance request granted by Judge Bradley was not indeed *ex-parte*, but with the permission of the State.

Co-defendants also assert that they will be unduly prejudiced by the reopening of the case. They assert all four co-defendants reside out of state prior to scheduled trial and the case had been rescheduled to a Monday because they were traveling from out-of-state. Co-defendants allege that they all appeared timely for trial in accordance with the Court issued summons. Co-defendants also assert in their Answer that they were all present with counsel and prepared for

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[2] In response, Mr. Balick argues in his Answer to the Motion while the Attorney General only moved to reargue the matter of *State v. Terri Maurer Carter*, he assumes that the case pertains to all co-defendants. Mr. Balick is correct for purposes of this Motion, the Court assumes all four cases are to be reargued.

[3] The State's witness' summonses were attached to its Motion.

trial on the scheduled date, April 4, 2005 at 1:30 p.m. Co-defendants note at that time, April 4, 2005, the Court appropriately checked with the Clerk of the Court (on the record) to satisfy that all parties received proper notice.

THE FACTS

As a statutory court of record the Attorney General's Motion to Reargue must be decided on the record.[4] On April 4, 2005 the Attorney General noted, "I checked at my office, on JIC and that is showing the dates were continued until Wednesdays morning calendar." Co-defendants' counsel noted the case had been scheduled for today (April 4, 2005) since March 9, 2005 and he represented all four defendants who "happen to be from out-of-state, and it was rescheduled from an, that April, that later date, to today some time ago…" Co-defendants' counsel indicated he had been "in touch with the Attorney General's Office by phone several times, and it was, it was always understood, since that change, that It's scheduled for today." Co-defendants' counsel moved to dismiss under Rule 48(b).

The Court Clerk, on the record April 4, 2005, upon request of the assigned Judge noted that "the original notices for the 6th went out in January. When it got closer it was March 9th, and that's when the notices for today went out." The Court noted that when asked what that meant, "Everybody was sent notice on March 9th saying that it was for the 4th". When questioned on the record by the assigned Judge, the Court Clerk noted "… all parties and all fact witnesses and all counsel were sent notices on March 9th for today?" with the affirmative, "yes". The Court docket indicated that those notices were sent out according to the Court Clerk including the lawyers. The Court Clerk also confirmed all the Defendants and fact witnesses were sent summonses on March 9, 2005 for the April 4, 2005 date.

[4] A copy of the official certified transcript is contained in the Criminal Clerk's file.

When again questioned by the Court, the Criminal Clerk on the record noted that all parties and all counsel were sent notices on March 9, 2005 for the April 4, 2005 trial date.

Upon further colloquy with the Court, the Criminal Clerk on the record on April 4, 2005 also indicated that the March 9, 2005 notices were also sent to Corporal Penrod and Underwood. Corporal New was not listed on the State's witness list.

The Court Clerk reaffirmed that notice to Corporal Underwood was for April 4, 2005 sent March 9, 2005 and that Officer Penrod received the same notice and/or summons.

The Deputy Attorney General noted at trial on April 4, 2005 that she was advised by her supervisor that the trial was rescheduled for Wednesday, April 6, 2005. The Deputy Attorney General already e-mailed all the troopers and the security and they were all noticed for Wednesday morning and were prepared to be here.

When the Court asked the prosecutor if she made any independent determination with the judge or the criminal clerk as to whether the trial was scheduled for April 4, 2005, the State replied no, but "simply received" information from her supervisor and went "straight to JIC". The Attorney General also confirmed she did not speak with Mr. Balick to confirm the cases were on for Monday, April 4, 2005. In response to the Court's inquiry why she didn't contact counsel, the prosecutor responded as follows, "I didn't, because I was just briefly between court sessions, I didn't. I probably should have done that."

In ruling on co-defendants' Motion for Dismissal, the Court noted before entering all Rule 48(b) Orders that "it never hurts as a prosecuting attorney to call the other side, the counsel, the criminal clerk and before you excuse your fact witnesses inform these entities, 'I've been told by a third party that the case are off'." The Court noted that all four defendants were not confused with the March 9, 2005 notices and that summonses were sent for April 4, 2005 trial.

The Court noted, ". . . before you call off your fact witnesses, it would seem prudent that at least check with the judge that has a calendar and the clerk who has [the] summonses."

THE LAW

In *State of Delaware v. James Rogovich*, 1991 Del. Super. LEXIS 63, Steel, J. (February 27, 1991) the Court made note of the standard for entering the Rule 48(b) Order as follows:

> Rule 48(b) provides "if there is unnecessary delay . . . **[*3]** in bringing a defendant to trial, the Court may dismiss the indictment." In order for a criminal indictment to be dismissed under Rule 48(b), the delay must be attributable to the State. *State v. Budd,* Del. Supr., 447 A.2d 1186 (1982) (dismissal proper where State proceeds on original indictment after representing to Court, in response to defendant's motion to dismiss, its intention to reindict defendant); *State v. Glaindez,* Del. Supr., 346 A.2d 156 (1975) (State made no attempt to ascertain whether the witness had been served with a subpoena until the day before trial); *State v. Fischer,* Del. Supr., 285 A.2d 417, 419 (1971) (court affirmed dismissal of indictments where the state engaged in unseemly practice of "transferring" cases from a lower court to higher court after the lower court had taken jurisdiction and become involved with the case); *cf. State v. McElroy,* Del. Supr., 561 A.2d 154 (1989) (no dismissal where delay caused by lack of an available trial judge and not prosecutorial delay); *Hughes v. State,* Del. Supr., 522 A.2d 335 (1987); (no dismissal for unnecessary delay where State made substantial efforts to ensure witness' appearance at trial); *State* **[*4]** *v. Johnson,* Del. Super., 564 A.2d 364 (1989) (n dismissal where State had no control over witness' disappearance and defendant knew of State's intention to reindict as soon as witness materialized); *State v. Mauthe,* Del. Super., C.A. Nos. IN85-05-1677-78, Taylor, J. (Apr. 4, 1986) (dismissal appropriate where four successive prosecutorial efforts were made and not until the fourth attempt, 13 months after arrest, was a legally supportable charge made). (Emphasis supplied).
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> In addition, the delay must be prejudicial to the defendant. *State v. McElroy,* Del. Supr., 561 A.2d 154, 155 (1989). Rule 48(b) serves a broader purpose and is not governed by established concepts of the speedy trial clause of the Constitution. *Hughes v. State,* Del. Supr., 552 A.2d 1335, 1340 (1987). The types of prejudice recognized by Rule 48(b) include: "the unexplained commencement of a new prosecution long after a dismissal by the

> State of the same charge in another court; the anxieties suffered by a defendant as the result of delay and uncertainty in duplicative prosecutions against him; the notoriety suffered by a defendant and his family as the result of repeated commencement of prosecutions for the same offense; **[*5]** the expenses, legal and otherwise, attendant upon a subsequent renewal in another court of a dismissed prosecution." *State v. Fischer,* Del. Supr., 285 A.2d 417, 419 (1971).

DISCUSSION

In deciding a Motion to Vacate a Rule 48(b) dismissal case law provides the Court must assess if a delay in the prosecution is (a) attributable to the State; and (b) has a prejudicial effect upon the defendant move that mere inconvenience. *See e.g. State v. McElroy*, Del. Supr., 561 A.2d 154 (1989). The Court must view the Motion as to whether there was an abuse of discretion. *State v. Kischie*, Del. Supr., 285 A.2d 417, 319 (1971).

Case defines the definition of prejudice under the provisions of Rule 48(b). In *State v. Fisher*, Del. Supr., 285 A.2d 417 (1971), the Supreme Court noted as follows:

> . . . We agree with the Court below in its conclusion that other types of prejudice may be sufficient to move the exercise of its discretion under Rule 48(b): the unexplained commencement of a new prosecution long after a dismissal by the State of the same charge in another court; the anxieties suffered by a defendant as the result of delay and uncertainty in duplicative prosecutions against him; the notoriety suffered by a defendant and his family as the result of repeated commencement of prosecutions for the same offense; the expenses, legal and otherwise, attendant upon a subsequent renewal in another court of a dismissed prosecution. These and like considerations may constitute sufficient "prejudices" to justify the exercise of the Court's discretion under Rule 48(b).

See also, State v. McElroy, Del. Supr., 561 A.2d 154 (1989).

As stated in *McElroy*, "prejudice may be any factor which causes or threatens legal harm or detriment to the defendant. Minimally, the prejudice must be something beyond that normally

associated with the Criminal Justice system necessarily strained by a burgeoning case load." *See e.g., State v. Harris,* Del. Supr., 616 A.2d 288 (1996).

There is no question that in the first instance the delay under the facts of this case is attributable to the prosecution. The Court must determine whether there was prejudice as sited under the existing sited case law applies to the facts of this case and the Court's April 4, 2004 Rule 48(b) Orders. Before the Court begins this analysis, it notes that the Attorney General has not sited any specific case law for the proposition of a reargument in the criminal context. Nor does the Attorney General argue the legal standard for Reargument on a Rule 48(b) Order in a statutory court such as Common Pleas. If matter this was before an appellate court the issue would be whether the record evidences an abuse of discretion by the court below in granting the Rule 48(b) dismissal. *See e.g., State v. Kozak*, Del. Super., Cr. C.A. No.: 99060385A, Vaughn, J. (Dec. 30, 1999).

The essence of the Attorney General's Motion is that there were duplicate notices sent to the parties and witnesses and instead of conferring with the Criminal Clerk, the Judge assigned to the case, or opposing counsel the State relied on her supervisor's representation that DELJIS indicated that trial was set for April 6, 2005. Since March 9, 2005 the State had multiple opportunities and forums to verify the April 4, 2005 1:30 trial date. The Court notes that all co-defendants appeared timely from outside of the State, hired counsel, and were present for Court. The Attorney General conceded that she could have contacted these parties before advising these witnesses that the case was on a later date. In addition, the summonses attached to the State's Motion to Reargue provide a summons to Frank Kaletta on March 9, 2005 for an April 4, 2005 1:30 p.m. trial date superseding the January 24, 2005 April 6, 2005 trial date. Obviously the later

date controls. All co-defendants were not confused and traveled from out-of-state to appear timely on April 4, 2004 at 1:30 p.m. for trial.

Besides the "prejudices" outlined above in the above case law, clearly defendants appeared from out-of-state and appeared in the jurisdiction of Delaware for trial based upon a Court approved continuance request approved by a Common Pleas Judge, William C. Bradley.

The Court is still convinced on the record that prejudice was involved and that the unnecessary delay in not preparing the case timely for trial was attributed to the Attorney General. *State v. McElroy*, Del. Supr., 561 A.2d 154 (1989). The Court notes much of the factual basis to reargue the facts presented by the State is not set forth on the record at the hearing when the Court originally decided the case. No leave to file additional affidavits or affidavits or to formally re-open the case was made by the State. To commence a new prosecution by granting a re-argument in this case would cause multiple prosecutions for the same offense. The State could have checked with the Criminal Clerk or the judge the day before trial. *See e.g., State v. Glaindez*, Del. Supr,. 346 A.2d 156 (1975). The Court finds the record satisfies the prejudices set forth in *Hughes* and *State v. Fischer* and declines Reargument in this matter.

OPINION AND ORDER

The Court thereby DENIES the State's Motion for Reargument in all four cases under Rule 48(b). The Criminal Motion hearing scheduled for May 6, 2005 is therefore moot.

IT IS SO ORDERED this 27th day of April 2005.

JOHN K. WELCH
Associate Judge